

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

75-4049
75-4055

B

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and
CAPTAIN EUGENE L. COCHRAN,

Petitioners,

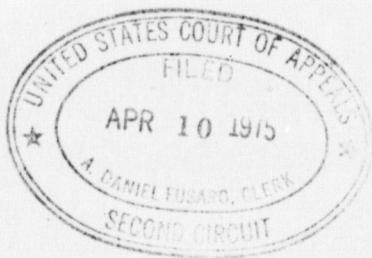
v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Consolidated Petitions to Review an Order of the
Civil Aeronautics Board

SUPPLEMENTAL DOCUMENTS



2

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the matter of embargo notices filed by:

ALASKA AIRLINES, INC.
ALLEGHENY AIRLINES, INC.
EASTERN AIR LINES, INC.
FRONTIER AIRLINES, INC.
HAWAIIAN AIRLINES, INC.
OZARK AIR LINES, INC.
PIEDMONT AVIATION, INC.
TRANS WORLD AIRLINES, INC.
WESTERN AIR LINES, INC.

Docket 27588

ANSWER OF THE UNITED STATES DEPARTMENT
OF TRANSPORTATION TO PETITION OF AIR
LINE PILOTS ASSOCIATION, INTERNATIONAL
FOR RECONSIDERATION AND FOR A STAY

Rodney E. Eyster
General Counsel

L.D. Santman
Acting Assistant General
Counsel for Litigation

Alexander P. Humphrey
Trial Attorney

400 Seventh Street, S.W.
Washington, D.C. 20590

March 13, 1975

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the matter of embargo notices filed by:

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ALLEGHENY AIRLINES, INC.
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ANSWER OF THE UNITED STATES DEPARTMENT
OF TRANSPORTATION TO PETITION OF AIR
LINE PILOTS ASSOCIATION, INTERNATIONAL
FOR RECONSIDERATION AND FOR A STAY

On March 5, 1975, the Airline Pilots Association, International (ALPA) filed a motion to request reconsideration of Order 75-2-127, February 28, 1975. In addition, ALPA has asked the Board to stay the effectiveness of this order. The United States Department of Transportation (DOT) opposes ALPA's motion and states in support thereof:

1. By Order 75-2-127, supra, the Board rejected the embargoes of nine air carriers which sought to refuse or to limit substantially all shipments of hazardous materials. Noting that each of the various embargoes differed from the Department of Transportation/Federal Aviation Administration (DOT/FAA) regulations which prescribe the suitability for carriage of hazardous materials, the Board concluded that these embargoes were in derogation of the

respondents' common-carrier obligations and their statutory obligation to provide adequate service. Order 75-2-127, supra, at 2.

2. ALPA asserted that the Board acted incorrectly and argues that the carriers are entitled to impose stricter standards than those embodied in DOT/FAA regulations by refusing transportation to any cargo which they believe would be dangerous to passengers or crew members. In particular, ALPA contends that such a refusal is authorized by section 1111(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1511(a).^{1/} ALPA also claims that air carriers can, in the name of safety, make the final determination as to which hazardous materials should be carried by air and those for which surface transportation would be sufficient.

3. Section 1111(a), however, was enacted to protect the traveling public against acts of criminal violence and aircraft piracy -- not to govern the transportation of hazardous materials. Even if section 1111 could be viewed as having some applicability to the latter area, it still does not support the construction which ALPA attempts to impose upon it.

^{1/} As most recently amended by § 204 of Title II of the Anti-Hijacking Act of 1974, Pub. L. 93-366, 88 Stat. 418, 1974 U.S. Code Cong. & Ad. News at 2473, § 1111(a) provides in pertinent part:

Subject to reasonable rules and regulations prescribed by the Administrator, any . . . [air] carrier may . . . refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to the safety of flight.

While section 1111 appears to authorize an air carrier to refuse transportation to any passenger or cargo which, in its opinion, may be inimical to the safety of flight, that authority is conditional. The opening clause of section 1111 expressly makes such refusal "[s]ubject to reasonable rules and regulations" prescribed by DOT/FAA. Where, as here, DOT/FAA has prescribed a comprehensive regulatory scheme governing the carriage of hazardous materials, section 1111 would permit a carrier at most to refuse transportation in the limited instance where a shipment of hazardous materials fails to conform in any material respect to DOT/FAA regulations. Contrary to ALPA's contention, section 1111 does not confer a warrant to refuse transportation to hazardous materials which conform with applicable DOT/FAA regulations and which the carrier is otherwise obligated to transport by virtue of its tariff and its statutory responsibilities as a common carrier.^{1/}

4. With respect to radioactive materials, carriers cannot, under the claim of safety, avoid their common carrier responsibilities as to cargoes not excluded by Congress in section 108 of the Transportation Safety Act of 1974. There Congress determined that the opposing interests in safety and in the expeditious movement of radio-

^{1/} The carriers' responsibilities to provide transportation to all materials conforming to DOT/FAA regulations can not be affected by the claim that these regulations are not "reasonable" within the meaning of § 1111. The proper forum for resolution of whether existing regulations adequately safeguard various interests from dangers of hazardous materials is DOT, as recognized by the Board. E.g., Order 75-3-13, March 6, 1975.

active materials are appropriately balanced by restricting transportation by any passenger-carrying aircraft to radioactive materials "intended to use in, or incident to, research, or medical diagnosis or treatment." In order to effectuate this balance, FAA has issued a notice of proposed rule making governing the transportation of radioactive materials by passenger-carrying aircraft. Notice 75-2, Docket 14249. 40 Fed. Reg. 5168-5169 (1975). Congress having spoken, air carriers are no longer free to determine that the balance should be struck more in the interest of safety. They cannot, by the use of embargoes or otherwise, appeal this legislative determination by refusing transportation to radioactive materials not so excluded by Congress or FAA's proposed rulemaking.

5. ALPA has also requested a stay of Order 75-2-127 "pending further administrative and judicial proceedings" (motion, at 2). However, the only administrative proceeding as yet unresolved is ALPA's own request for reconsideration. Because ALPA has not sought judicial review of the order in question, its request for a stay should be denied as premature.

WHEREFORE, for the foregoing reasons, the Board should deny ALPA's request for reconsideration and for a stay.

Respectfully submitted,

Rodney E. Eyster

March 13, 1975

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing document has this day been served upon all the parties of record to this proceeding.

/ Alexander P. Humphrey

March 13, 1975



UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 19th day of March, 1975

In the matter of embargo notices :
filed by: :

ALASKA AIRLINES, INC. :
ALLEGHENY AIRLINES, INC. :
EASTERN AIR LINES, INC. :
FRONTIER AIRLINES, INC. :
HAWAIIAN AIRLINES, INC. :
OZARK AIR LINES, INC. :
PIEDMONT AVIATION, INC. :
TRANS WORLD AIRLINES, INC. :
WESTERN AIR LINES, INC. :

Docket 27588

ORDER DENYING STAY

By Order 75-2-127, dated February 28, 1975, the Civil Aeronautics Board rejected embargo notices which had been filed by the nine air carriers listed below.^{1/} The notices advised that the carriers would refuse and/or limit carriage of substantially all hazardous materials. On March 5, 1975, the Air Line Pilots Association (ALPA) filed a petition for reconsideration and for stay of that order. The Board will consider the request for a stay without awaiting responses thereto, and will deny the request. ^{2/} Action on the petition for reconsideration will be deferred until all parties and interested persons have had an opportunity to respond thereto.

^{1/} Alaska Airlines, Inc.; Allegheny Airlines, Inc.; Eastern Air Lines, Inc.; Frontier Airlines, Inc.; Hawaiian Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; and Western Air Lines, Inc.

^{2/} ALPA has petitioned the United States Court of Appeals for the Second Circuit for review of the Board's order. Accordingly, the Board is considering the request for stay promptly for the convenience of the Court.

As indicated, our action herein is for the convenience of the Court and does not pass upon the standing of ALPA in this proceeding.

In support of its petition, ALPA alleges error in the Board's order in that the carriers have a right under sections 404 and 1111 of the Federal Aviation Act of 1958 (the Act) to impose stricter standards for carriage of hazardous goods than the government's minimum safety standards and to reject cargo which they deem inimical to safety of flight. ALPA alleges that the Department of Transportation/Federal Aviation Administration (DOT/FAA) regulations do not require any carrier to accept any cargo but rather allow only the acceptance of properly labeled, packaged, etc., hazardous materials. ALPA asserts that the Board's own regulations are to the same effect, citing 14 CFR sections 221.104, 221.38(a)(5), and 228.1.

These allegations miss the crux of the Board's rejection of the embargoes. The Board found that:

1. The carriers' embargoes gave notice that they would not accept a broad list of articles which are suitable for carriage under the regulations of the DOT/FAA and,
2. The embargoes would prohibit carriage of many items necessary for medical or other important purposes and were in derogation of the airlines' common carrier obligation to carry, and their statutory obligation to provide adequate service.

Contrary to the implication in ALPA's petition, the Board has not purported to determine whether the DOT/FAA regulations are minimum, or minimum and maximum standards, nor was the order premised on any theory that the airlines' obligation to carry traffic stems from those regulations. Rather, the Board considers that a carrier's refusal to carry traffic tendered in accordance with the safety regulations is inconsistent with its statutory obligation to provide adequate service, and with its duties assumed in the acceptance of a certificate of public convenience and necessity.

Special comment is also warranted on ALPA's assertion of a carrier's statutory right under section 1111 of the Act, to refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight. The Board does not accept this contention. ALPA's quotation of section 1111 omits a provision which is critical to the issues involved here. The sentence in Section 1111(a) of the Act referred to by ALPA is therefore set forth in full:

"Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." (Emphasis supplied)

It is clear from reading the entire section that Congress intended any carrier refusal to transport property for safety reasons to be subject to reasonable rules and regulations prescribed by the FAA Administrator. By answer in opposition to the ALPA petition, DOT similarly asserts that section 1111 does not confer a warrant for carriers to refuse transportation of hazardous materials which conform with applicable DOT/FAA regulations. Such regulations have been prescribed at length on what material may be carried in passenger-carrying aircraft as well as on all-cargo aircraft, the permissible amounts and packaging requirements therefor, what materials may not be carried, etc. The FAA Administrator having thus preempted this area of regulation,^{3/} no basis remains to conclude that carriers are free to pick and choose their traffic.

We turn next to ALPA's contention that the Board must reconsider or grant ALPA a hearing on the finding that items necessary for medical or other purposes are subject to the embargoes herein involved. ALPA argues that this statement was erroneous and that the Board would have been so aware if it had looked at ALPA's February 25 filing, where it explained in detail that the STOP program exempts from its ban a variety of medical materials which must be shipped by air to avoid delays.

While the STOP program may now exempt a variety of medical materials, as ALPA asserts, the embargoes of the carriers did not and the Board's order of rejection was directed to those embargoes. Our order was based upon a comparative analysis of the materials which would be banned by the embargo notices filed by the carriers and of the DOT/FAA regulations relating to hazardous materials. It was not an order directed to ALPA or its member pilots.

In summary, ALPA urges Board acceptance of the STOP program and of carrier notices implementing it to avoid irreparable harm pending further administrative and judicial proceedings as set forth above. The Board finds no basis for error in its actions nor other reasons to grant the requested stay. To take such action would abrogate our statutory responsibilities

^{3/} The language of the Act clearly requires this interpretation. The Secretary of Transportation has advanced contentions of the same import. See the complaint of the DOT in Docket 27488 wherein this position is vigorously set forth as follows:

"5. Because the FAA exercises exclusive jurisdiction to regulate safety in air commerce and because the FAA has, by regulation, provided for the safe carriage of radioactive and other hazardous materials, individual carriers are legally precluded from engaging in ad hoc regulation of the transportation of those materials in derogation of the statutory authority and responsibility of the DOT/FAA. DOT is therefore an 'interested person' to object to this usurpation of jurisdiction."

to the shipping and consuming public by sanctioning pervasive refusals to carry shipments^{4/} required by the public.^{5/} We agree with DOT's statement that the carriers are in effect seeking to engage in ad hoc regulation of the carriage of hazardous goods through a series of embargoes of greater or lesser coverage. As noted above, we do not consider this consistent with their statutory obligations.

Upon consideration of the ALPA petition for a stay, the matters set forth above, and all relevant matters before the Board, the petition for stay will be denied.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958 and particularly sections 204(a) and 404 and the provisions of Part 228 of the Board's Economic Regulations (14 CFR Part 228),

IT IS ORDERED THAT:

1. The request for a stay, contained in the petition of the Air Line Pilots Association, International, for reconsideration and for a stay in Docket 27588, is denied;

2. Action is deferred upon the request for reconsideration contained in Docket 27588 to permit time for responsive pleadings in accordance with the Board's Rules of Practice in Economic Proceedings; and

3. A copy of this order be served upon Alaska Airlines, Inc., Allegheny Airlines, Inc., Eastern Air Lines, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Trans World Airlines, Inc., Western Air Lines, Inc. and the Air Line Pilots Association, International.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

^{4/} We need not and do not here reach the question of the extent of the authority of an air carrier to refuse to carry a particular shipment of hazardous goods based upon circumstances relating specifically to that shipment.

^{5/} The Board has received informal correspondence asserting that radio-pharmaceutical shipments have recently been refused by airline crews which in turn has resulted in failure to perform needed medical diagnosis.